No. 96-1116

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AIRCRAFT BRAKING SYSTEMS CORPORATION,
Petitioner,

v.

LOCAL 856, INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

and

AMERICAN ARBITRATION ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an arbitrator may ignore a prior judicial determination that disputes arising under the collective bargaining agreement are arbitrable?

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BRIEF IN OPPOSITION

Respondent Local 856, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, respectfully requests that this Court deny the petition for *writ of certiorari* which seeks review of the Sixth Circuit's opinion below. That opinion is reported at 97 F.3d 155 and is reprinted in the Petition for Certiorari at Appendix A.

STATEMENT OF THE CASE

This case involves an attempt by the Petitioner, Aircraft Braking Systems Corporation (hereinafter ABS or

the Company), to avoid a prior judicial determination that disputes under the applicable collective bargaining agreement are arbitrable.

On August 10, 1991, the collective bargaining agreement between ABS and the Respondent, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local 856 (hereinafter UAW or the Union), expired and ABS unilaterally imposed its final proposal upon its hourly employees. This proposal contained a grievance and arbitration procedure.

In prior litigation between these same parties involving ABS's refusal to arbitrate a grievance, District Court Judge Samuel Bell concluded that the parties had an interim agreement to arbitrate grievances under the implemented final offer. *Aircraft Braking Systems Corporation v. Local 856, UAW*, No. 94-CV-873 (N.D. Ohio, May 14, 1993), Appendix F (120a-128a), *affirmed* No. 93-3614 (6th Cir., April 21, 1995), *cert. denied*, 116 S. Ct. 182 (1995) (hereinafter *ABS I*). The Sixth Circuit affirmed the District Court Opinion and this Court denied ABS's petition for certiorari. *ABS I*, 161 S. Ct. 182.

On March 8, 1994, before the Sixth Circuit affirmed Judge Bell's Opinion in *ABS I*, the Company initiated the instant case by filing a complaint against Respondent UAW and the American Arbitration Association seeking a Temporary Restraining Order and Preliminary Injunction to stay arbitration of two other grievances filed by the UAW. On April 4, 1994, the District Court declined to stay the arbitration. Appendix C (57a-58a).

The grievance then proceeded to arbitration where ABS's representative asserted at the beginning of every day of the hearings that there was no agreement to arbitrate and that ABS was present at the proceedings under protest. The Union's representative indicated that Judge Bell in *ABS I* had decided the issue of arbitrability when he ruled that there was an interim contract. Because

ABS raised the issue of arbitrability, the Arbitrator decided that he had to resolve this threshold issue before reaching the merits of the grievance. Therefore, both ABS and the UAW brought several witnesses to testify concerning this issue.

On March 1, 1995, the Arbitrator issued his decision, and concluded that there was no "interim labor agreement" and no enforceable agreement to arbitrate. Appendix D (59a-101a). The Arbitrator further held that Judge Bell's order in *ABS I* was "not binding upon this Arbitrator." Ignoring the parties' arbitration of approximately 33 other grievances submitted after the implementation of the final offer, the Arbitrator concluded that since the UAW had never ratified the no-strike clause in the final offer, ABS was not under the duty to arbitrate.

ABS and the UAW then filed motions with the District Court to confirm and vacate this award respectively.

On May 4, 1995, District Court Judge David Dowd ordered the parties to submit memoranda addressing the issue of whether the previous District Court opinion, in *ABS I*, finding that the parties had an interim agreement to arbitrate grievances was *res judicata* as to the issue of arbitrability. After considering these memoranda, District Court Judge Dowd determined that the previous opinion was *res judicata,* vacated the Arbitrator's decision, remanded the grievance to a new arbitrator, and awarded the UAW attorney's fees. Appendix B (25a-54a).

On July 12, 1995, ABS appealed this decision to the United States Court of Appeals for the Sixth Circuit, which subsequently affirmed Judge Dowd's Opinion. *Aircraft Braking Systems Corporation v. Local 856, UAW,* 97 F.3d 155 (6th Cir., 1996). Appendix A (1a-24a).

In its petition, ABS argues that the Sixth Circuit's opinion conflicts with this Court's ruling in *First Options of Chicago, Inc. v. Kaplan,* 115 S. Ct. 1920 (1995),

because the Circuit should have used a more deferential standard of review, in analyzing the Arbitrator's Award.

ABS's arguments are without merit and the Petition should be dismissed.

REASONS FOR DENYING THE WRIT

THE SIXTH CIRCUIT CORRECTLY HELD THAT AN ARBITRATOR CANNOT IGNORE A PRIOR JUDICIAL DETERMINATION THAT DISPUTES ARISING UNDER THE COLLECTIVE BARGAINING AGREEMENT ARE ARBITRABLE.

ABS asserts that the Sixth Circuit did not follow this Court's opinion in *First Options,* because the Circuit used the independent review standard rather than the deferential approach normally applied to analyzing an arbitrator's decision.[1] The deferential approach, according to ABS, is appropriate because "[b]oth parties relinquished their right to independent review of the issue of arbitrability. . . ." (Page 8 of Petitioner's Brief). ABS misstates the law and the known facts.

This Court in *First Options* has recently concluded that two different standards are appropriate when reviewing an arbitrator's decision. Where the parties *agreed* to submit the issue of arbitrability to arbitration, then the Court "should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *First Option*s, 115 S. Ct. at 1923. However, where "the parties did *not* agree to submit the arbitrability question to arbitration, then the court should decide that question . . . independently." *First Options,* 115 S. Ct. at 1924. When courts decide whether parties have agreed to permit an arbitrator to decide arbitrability,

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[1] ABS does not assert that there is a dispute among the Circuits, but only asserts that the Sixth Circuit has not followed *First Options.*

"Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable evidence that they did so' (citation omitted)." *Id.*

In light of the above standard, the Sixth Circuit observed that the parties here submitted the issue of arbitrability to Judge Bell in *ABS I*, who decided that there was a binding grievance and arbitration clause. That conclusion was affirmed by the Sixth Circuit and certiorari was denied. *ABS I.*

Having failed to convince the courts of the merits of its position in *ABS I*, the Company initiated this action to *enjoin* the arbitration of the grievance on the grounds that the arbitrator had no authority to hear it raising essentially the same arguments asserted in *ABS I.* ABS lost this argument before Judge Dowd, who refused to enjoin the arbitration. Then, at the arbitration hearing, ABS's representative asserted at the beginning of every day of the hearing that there was no agreement to arbitrate and was only present to "avoid contempt of court." This conduct surely demonstrates ABS's refusal, rather than its consent, to the Arbitrator's jurisdiction. Similarly, the UAW represented to the Arbitrator that Judge Bell had already decided the issue of arbitrability. Appendix A (14a-15a).

In light of the record, it is not surprising that the District Court and the Sixth Circuit both concluded that the parties had *not* agreed to arbitrate the issue of arbitrability. Appendix A (14a-15a); Appendix B (40a-42a).

Furthermore, contrary to ABS's assertions, the mere fact that ABS argued the issue of arbitrability at the hearing, and that the UAW presented evidence to oppose ABS's argument, does not demonstrate consent to the Arbitrator's authority. In *First Options*, the Court explicitly held that appearing at a hearing to argue arbitrability was not "clear and unmistakable" evidence of the submission of that issue to an arbitrator. *First Options*,

115 S. Ct. at 1925. In fact, as the District Court pointed out, ABS's forceful objections demonstrate that it "did not want the arbitrator to have binding authority over [it]." Appendix B (15a).

It thus could not be more clear that the Courts below appropriately framed the issue to be whether the parties had agreed to arbitrate arbitrability, applied the appropriate independent standard, and concluded that the evidence did not indicate in a clear and unmistakable fashion that the parties had agreed to arbitrate arbitrability. In fact, the Circuit concluded that the parties did not submit the issue of arbitrability to the arbirator. Appendix A (14a-15a).

The Circuit then goes on to conclude, which ABS does not challenge, that ABS was collaterally estopped from re-litigating the existence of an interim agreement and its arbitration clause, having failed to prevail on that issue in *ABS I*. Appendix A (18a-19a).

Therefore, the Sixth Circuit has correctly applied *First Options* and appropriately concluded that ABS may not re-litigate the existence of an interim agreement and its arbitration clause.

CONCLUSION

The petition for certiorari should therefore be denied.

Respectfully submitted,

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